

CDOT Project Number BR 00-61-083, 18838

# CONTRACT

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BETWEEN THE  
COLORADO DEPARTMENT OF TRANSPORTATION  
AND THE  
BNSF RAILWAY COMPANY

COVERING  
THE RECONSTRUCTION OF THE EXISTING US6 OVERPASS  
GRADE SEPARATION CROSSING STRUCTURE

AT  
RAILROAD MILE POST 2.66 –  
Pikes Peak Subdivision, LS 477  
NIC No. 245397R

CDOT Project Number BR 00-61-083  
Sub Account 18838  
US6 Bridges Design Build Project

In  
Denver County,  
Colorado

BR 00-61-0083, 18838  
US6 Bridges Design Build Project  
Denver County;  
NIC No. 245397R

## CONTRACT

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THIS CONTRACT, effective immediately upon the signature of the State Controller, by and between the **STATE OF COLORADO**, for the use and benefit of the Colorado Department of Transportation, Division of Engineering and Maintenance ("State"), and BNSF RAILWAY COMPANY, formerly known as the "The Burlington Northern and Santa Fe Railway Company", hereinafter referred to as "BNSF" or "Railroad".

WHEREAS, authority exists in the Law and Funds have been budgeted, appropriated and otherwise made available for the "Project" and all Railroad Contract Encumbrances will be borne by the State's Design Build Contractor; and

WHEREAS, the estimate for flagging days will be completed and submitted by the State's Design Build Contractor; and

WHEREAS all flagging costs will be paid by the State's Design Build Contractor; and

WHEREAS engineering design review by the Railroad of Plans required for approval by the Railroad will be paid by the State's Design Build Contractor; and

WHEREAS, required approval, clearance and coordination has been accomplished from and with appropriate agencies; and

WHEREAS, the State has the authority, as provided in sections 43-1-110 and 43-4-204, C.R.S. to enter into contracts, including contracts with railroads for construction work; and

WHEREAS, the State also has the authority, as provided in section 24-92-103, C.R.S., to solicit competitive sealed bids for construction of public projects; and

WHEREAS, the United States Highway 6 (US6) Existing Structure crosses over the ~~BNSF~~ Railroad that is defined in Article I; and

WHEREAS, the State will award a Design Build contract for the work, which includes demolishing the Existing Structure (E-16-EF), construct the New Structure (E-16-YZ) that is defined in Article I. **Exhibit A**, representing the Conceptual Submittal which contains a location map and preliminary design with approximately 30% plan detail is attached hereto and hereby made a part hereof; and

WHEREAS, the State's Design Build Contractor will be required to perform the "Project Work," as defined in Article I, on Railroad property, that is necessary to complete the Project; and

WHEREAS, it is desirable, for the benefit, convenience and safety of the public using the state highway system and for the parties hereto, that the improvements provided by this Contract be accomplished; and

WHEREAS, it is in the public interest that Railroad ~~Company~~ forces perform flagging for and railroad safety inspections for the Work; and

WHEREAS, it is in the public interest that Railroad ~~Company~~, or its designated Agent perform and complete Design Reviews for purpose of approving the Work; and

WHEREAS, the State will continue to utilize the existing property from the Railroad Company as described in the Existing Agreements, **Exhibit E-1** and **Exhibit E-2**, in order to demolish and remove the Existing Structure and construct and maintain the New Structure; and,

WHEREAS, the Existing Structure was constructed under the Existing Agreements that isare defined in Article I; and

WHEREAS, the Railroad ~~Company~~ and the State wish to modify the Existing Agreements as set forth in Article IV, Section F, and enter into this Agreement to cover the construction, maintenance and operation of the New Structure.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements herein contained, and the faithful performance thereof, the parties hereto promise and agree as follows:

## ARTICLE I GENERAL PROVISIONS

### SECTION A. DEFINITIONS

- |          |   |  |
|----------|---|--|
| 1. FHWA  | - | Federal Highway Administration   |
| 2. MUTCD | - | The Manual on Uniform Traffic Control Devices for Streets and Highways |
| 3. PUC   | - | Public Utilities Commission of Colorado                                |
| 4. CFR   | - | Code of Federal Regulations  |
| 5. CRS   | - | Colorado Revised Statutes  |

6. The term "Contractor" or "Design Build Contractor" shall mean any individual, partnership, firm, corporation or any combination thereof including their respective officers, agents, employees and their respective subcontractors including officers, agents and employees that are hired by the State to perform any Project Work. **This term shall not include Railroad.**

7. The term "Agent" shall mean any individual, partnership, firm, corporation or any combination thereof including their respective officers, agents, employees and their respective subcontractors including officers, agents and employees that are hired by the Railroad to perform any Railroad Work.

8. The term "Existing Agreements" shall mean the agreements dated August 24, 1956 and January 31, 1967, between the State of Colorado, acting by and through the State Highway Department and the Colorado and Southern Railway Company ("C&S"), and the Atchison Topeka Railway Company ("~~Santa Fe~~ATSF") covering the construction and use of US6 Highway including the Existing Structure that carries US6 over the Railroad line. ~~A-Ceopiesy~~ of the Existing Agreements are attached hereto as **Exhibit E-1 and Exhibit E-2.**

9. The term "Existing Structure" shall mean the existing US6 Structure (E-16-EF) constructed pursuant to and under the Existing Agreements at Railroad ~~Company~~-Milepost 2.66 on the Railroad's Pikes Peak Subdivision, LS 477, at NIC No. 245397R near the City of Denver in Denver County, Colorado.

10. The term "New Structure" shall mean the new US6 Overpass Structure (E-16-YZ) at Railroad ~~Company~~-Milepost 2.66 on the Railroad's Pikes Peak Subdivision, LS 477, at NIC No. 245397R near the City of Denver in Denver County, Colorado.

11. The term "Plans" shall mean the final one hundred percent (100%) completed plans, with typical section and layout pages. The Plans shall include all appurtenances, associated drainage, and excavations for bents and/or abutments next to or adjacent to the Railroad's tracks. Plans shall be prepared and submitted for design and demolition of the work. Plans shall be prepared and submitted in accordance with Railroad policies and procedures. The Conceptual Submittal which contains a location map and preliminary design with approximately 30% plan detail is included herein as **Exhibit A**. Final Design Plans representing 100% detail will be completed and submitted by the State's Design Build Contractor. The State and the State's Design Build Contractor shall complete, submit and construct the Plans (100% Design Plans) in complete accordance with this Executed Agreement and **Exhibit G** (BNSF UPRR – Guidelines for Railroad Grade Separation Projects). All costs associated with plan preparation and submittal shall be at the expense of the State's Design Build Contractor. All plans shall be approved in writing by the Railroad-~~Company~~'s Assistant Vice President Engineering - Design, or his authorized representative prior to commencing work.

12. The term "Project" shall mean the State's Project Number BR 00-61-083, 18838 covering the demolition of the Existing Structure and construction of the New Structure.

13. The term "Railroad Work" shall consist of the following work performed by Railroad ~~Company~~ forces: Engineering design review; and Flagging services.

14. The term "Project Work" shall consist of the following work performed by the Contractor: Demolition and removal of the Existing Structure, the construction of the New Structure.

#### SECTION B. EXHIBITS

The exhibits listed below are attached hereto and made a part of this Contract:

Exhibit A      Conceptual Submittal

Exhibit B      Draft PUC Application

Exhibit C      ~~Right of Entry~~ Contractor Requirements

Exhibit C-1    BNSF Railway Company and the Contractor Agreement

Exhibit E-1    UI 002-2(30) Agreement dated August 24, 1956

Exhibit E-2    F 012-2(12) Agreement dated January 31, 1967

Exhibit F      Civil Rights Exhibit

Exhibit G      Railroad's Minimum Requirements for Overpass Structures

Exhibit I      BNSF Form 432, Temporary Private Crossing

#### SECTION C. REFERENCE DOCUMENTS

The following are made a part of this Contract by reference, the same as if attached hereto including any supplements or amendments thereto dated prior to the date of this Contract.

23 CFR §140.900 et. seq. (2011)

23 CFR §646.101 et. seq. (2011)

23 CFR §646.200 et. seq. (2011)

MUTCD, Dated 2010

## ARTICLE II COMMITMENTS ON THE PART OF RAILROAD

### SECTION A. RIGHT OF WAY

The State, as successor in interest to the State Department of Highways of the State of Colorado, and the BNSF as successor in interest to the Colorado and Southern Railway Company ("C&S") and the Atchison, Topeka and Santa Fe Railway Company ("ATSF") entered into an agreement dated August 24, 1956 wherein the ~~C&S and ATSF Railroad Company~~ granted the State a ~~right-license~~ to construct the ~~US6-current~~ Existing sStructure over the ~~Railroad C&S and ATSF lines~~ at Railroad ~~Company~~ Milepost 2.66 on the Railroad's Pikes Peak Subdivision, LS 477, at NIC No . 245397R. A copy of the 1956 agreement is attached hereto as Exhibit E-1. ~~C&S later conveyed an easement, E-13, to the State for the Existing Structure. The same parties entered into a supplemental agreement dated January 31, 1967 for the widening of the Existing Structure. C&S conveyed to the State an additional easement, ER5 as shown and described by meets and bounds on Exhibit A to Exhibit E-2 attached hereto to accommodate the widened structure. ER5~~The effective area for such ~~right~~ shall hereinafter be referred to as the "Property". The Existing Agreements also allowed the State to "maintain, repair, renew and use". The Project can be constructed within the Property and such construction is allowed in the Property as long as it is conducted in compliance with the terms and conditions of this agreement. At the completion of the Project, the State shall also maintain, repair, renew and use the New Structure in compliance with this Agreement.

### SECTION B. PLANS; CONSTRUCTION

1. The Plans are hereby made a part of this Contract by reference. No changes in the Plans shall be made unless the Railroad has consented to such changes in writing. The Railroad's review and approval of the Plans in no way relieves the State or the State's Design Build Contractor from their responsibilities, obligations and/or liabilities under this Agreement, and will be given with the understanding that the Railroad makes no representations or warranty as to the validity, accuracy, legal compliance or completeness of the Plans and that any reliance by the State or the State's Design Build Contractor on the Plans is at the risk of the State and the State's Design Build Contractor. Project special provisions affecting the interests of the Railroad are also subject to approval by the Railroad. All work under this Contract shall be performed strictly in compliance with the Plans, special provisions and any guidelines or standards furnished by the Railroad to the State and the State's Design Build Contractor for this Project. The State and the State's Design Build Contractor confirms that no work of demolition or new construction is to commence until the Railroad's Assistant Vice President Engineering - Design or his authorized representatives have given final approval of the Plans.

2. The State also confirms that when the State advertised for bids from Contractors for this Project, it did include, among other things, **Exhibit C, C-1** and **Exhibit G** in its bid package and will require all Contractors awarded bids to work on this Project to comply with the Plans,

provisions contained in **Exhibit C, C-1** and **Exhibit G** and other guidelines or standards furnished by the Railroad to the State for this Project.

## SECTION C. CIVIL RIGHTS

The Railroad, in the prosecution of the work herein prescribed, will adhere to the requirements of the Civil Rights **Exhibit F**, and will include the provisions of the said Civil Rights Exhibit in every subcontract; including procurement of materials and leases of equipment, unless exempt by the Regulations, orders or instructions issued pursuant thereto.

## SECTION D. RAILROAD WORK; BILLING SENT TO THE STATE'S DESIGN BUILD CONTRACTOR.

1. Flagging. The Railroad will be providing flagging if needed during the Project. Labor charges for any Railroad Work performed by Railroad forces will be in accordance with the then current working agreements between the Railroad and its employees and are subject to Railroad's standard direct and indirect labor costs and additives costs as identified in 23 CFR Part 140 Subpart I. The cost of flagger services provided by the Rail~~way~~road will be borne by the States's Contractor. The estimated cost for one (1) flagger is approximately between \$800.00-\$1,600.00 for an eight (8) hour basic day with time and one-half or double time for overtime, rest days and holidays. The flagging costs are for a normal business day and do not include weekends, overtime or holiday pay. The Railroad has agreed to directly bill the State's Design Build Contractor for flagging costs, and to provide a copy of the billing to the State. The bills submitted by the Railroad to the State's Design Build Contractor, and the copy to the State, shall reference the Project Number. The State agrees to withhold ten percent (10%) of the estimated flagging costs as retainage until the Railroad has been paid in full for its final bill for flagging and other costs owed by the Contractor to the Railroad. ~~The Railroad's estimated flagging costs are set forth in Exhibit C.~~ The parties agree that the State's Design Build Contractor shall estimate the number of Railroad flagging days necessary for the required demolition of the Existing Structure and the construction of the New Structure.

2. Railroad's Billings. The Railroad shall bill the Design Build Contractor for all Railroad Work. A copy of each billing shall also be provided to the State. The Railroad shall bill based on all actual costs incurred by the Railroad in performing the Railroad Work. Actual costs shall be determined in accordance with 23 CFR Part 140, Subpart I and will include indirect and direct labor additives.

3. Final Bills Within One Year of Project Completion. The Railroad shall send a final bill to the Design Build Contractor, with a copy to the State, within one (1) year following completion of the Project for all work performed on the project by the Railroad. The State shall provide the Railroad with written notice of the completion of the Project, thus marking the beginning of the one-year period. If the Railroad does not present its final billing as described herein within such one-year time period, as required by 23 CFR §140.922 (2010), then previous

payments to the Railroad for the Railroad Work may be considered as final and complete reimbursement for such work and the State may close out the Project with no further financial obligation.

#### SECTION E. RAILROAD'S RELATIONS WITH STATE'S CONTRACTOR

1. Insurance - Notice to State. The State agrees that it will not authorize any Contractor to enter upon or perform any work contemplated by this Contract across or adjacent to the Railroad's property unless or until the insurance specified in **Exhibit C-1**, shall be delivered to and accepted by the Railroad. The insurance shall be kept in full force and effect during the times any Project Work is being performed across or adjacent to Railroad property by any Contractor. The Railroad shall endeavor to notify the State within twenty (20) calendar days following delivery of said certificates and policies of insurance to the Railroad, whether said insurance has been accepted or rejected.

2. State's Construction Contract Requirements. In conformity with the requirements of 23 CFR, Part 646, Subpart B and Part 140, Subpart I, the Railroad agrees to furnish the State detailed information set forth in Article III, Section A, paragraph 5 hereinafter, which data shall be included in the State's Construction Contract Provisions for the Project.

3. Railroad's Right to Stop Work. If the State's Design Build Contractor shall prosecute the Project Work across or adjacent to the Railroad property contrary to the Plans, the provisions of **Exhibit C and C-1** and **Exhibit G** or other guidelines or standards furnished to State, or if the Contractor shall prosecute the Project Work in a manner deemed hazardous by the Railroad to its property and facilities, or if the insurance prescribed in Article III, Section B, paragraph 3 hereof shall be cancelled during progress of said work, the Railroad shall have the right to stop the Project Work across or adjacent to Railroad property until the acts or omissions of such Contractor have been fully rectified to the satisfaction of the Railroad's Assistant Vice President Engineering - Design, or until additional insurance has been delivered to and accepted by the Railroad's insurance department. Such work stoppage shall not give rise to or impose upon the Railroad any liability to the State or any Contractor. In the event the Railroad shall stop the Project Work herein provided, the Railroad agrees to give immediate notice thereof, in writing, to the Chief Engineer, Colorado Department of Transportation 4201 East Arkansas Ave., Denver, CO 80222.

### ARTICLE III COMMITMENTS ON THE PART OF THE STATE

#### SECTION A. STATE ACTIVITIES

1. Advertisement for Bids - Contract. The State, utilizing Design Build procurement methods shall select a Design Builder and entered into, and Award, a Design Build contract for



the Project Work across or adjacent to the Railroad's property. The State included the Preliminary Plans marked as **Exhibit A, Exhibit C, C-1 and Exhibit G**, and other guidelines or standards furnished to the State in its procurement document package for the design of the 100% Plans and construction.

2. Construction by the State. The State shall perform, or cause to be performed, in a manner acceptable to the Railroad all Project Work across or adjacent to the Railroad's property in compliance with the Plans, **Exhibit C, C-1 and Exhibit G** and any guidelines or standards furnished by the Railroad.

3. Supervision by the State. The State shall maintain supervision over the operations of its Contractor while performing Project Work across or adjacent to the Railroad's property. The responsibility of the State for supervision of the Project shall not be lessened or otherwise affected by the Railroad's approval of the Plans or by the Railroad's collaboration in performance of any work, or by the presence at the work site of the Railroad's representatives, or by compliance by the State or the Contractor with any requests or recommendations made by such representatives. If a representative of the Railroad is assigned to the Project, the State and the Contractor will give due consideration to suggestions and recommendations made by such representative for the safety and protection of the Railroad's property and operations. However, at all times such Contractor shall be considered an independent contractor and not an employee of the State.

4. Utilities. The State's construction contract includes provisions that the Contractor take such measures as the Railroad and the State may agree upon in writing respecting any utilities located upon the Railroad's right of way as hereinafter provided. It is understood and agreed that the owner of any utility, located on the Railroad's property, retains the right to move, repair, recondition or relocate the same at the State's expense. The State shall require that if, during progress of the Project Work, the Contractor shall discover any utility that has a right to be on the Railroad's right of way, but that is not specifically mentioned and provided for elsewhere in the Plans, which utility must be moved, repaired, reconditioned or relocated because of this Project, the Contractor shall initiate immediate notice thereof to the State and the Railroad, and the State will furnish directions respecting the same; but, unless otherwise agreed upon between the State and the Railroad, the State will authorize the Contractor to make only such temporary or emergency repairs as may be required to protect and safeguard the utility and the property of the Railroad prior to commencement of work thereon by the owner of the utility or the Railroad. When such operations are undertaken by the owners of the utility or the Railroad, the State will require the Contractor to cooperate to the extent that ample protection of such work will be provided, to the end that the entire Project contemplated by this Contract may be expedited. The terms "utility" and "utilities" as used herein include all properties and facilities of any person, firm or corporation constituting any part of the utility system, including, but not limited to, pipe lines, wire lines, fiber optic lines, tube lines, water and gas mains, electrical conduits, sewer pipes, overhead wiring, and supporting structures and appurtenances. All proposed and relocated utilities are subject to the prior review and approval of the Railroad's Vice President Engineering - Design or his authorized representatives and shall comply with the Railroad's standard specifications and requirements, including, without limitation, American Railway Engineering and Maintenance-of-Way Association ("AREMA") standards and guidelines.

5. Flagging Services (Specifications for Construction). In consideration of the requirements of 23 CFR, Part 646, Subpart B, and Part 140, Subpart I, the State agrees that any contract awarded to any Contractor as herein provided will include in the specifications for construction the following general information:

a. The provisions of this Contract applicable to the flagging services the Railroad may require during the performance of the Project Work across or adjacent to the Railroad property.

b. The Contractor will be required to sign **Exhibit C-1** and deliver same to the State for delivery to Railroad and all subcontractors will be required to have signed an endorsement by the Contractor's insurance company.

c. The times and manner in which the Railroad will submit its billings to the State's Design Build Contractor.

6. Advance Warning Protection. The State will require its Contractor to furnish, maintain and install advance warning signs or barricade protection which may be required for the duration of the Project Work for the protection of the Railroad's facilities and the work contemplated hereunder.

7. Payment of Billing from Railroad. The State's Design Build Contractor shall pay the Railroad for all actual costs incurred by Railroad in performing the Railroad Work including Railroad's standard direct and indirect labor additives within ~~forty-five (45)~~ thirty (30) days of the State's Design Build Contractor's receipt of billing from the Railroad.

## SECTION B. STATE'S CONSTRUCTION CONTRACTOR ACTIVITIES

1. Contractor's Defaults and Omissions. To the extent authorized by law, the State shall require its Contractor to correct or eliminate any defaults or omissions of the Contractor for all Project Work performed relative to this Contract.

2. Contractor's Operations. In consideration of the premises and of the rights granted to the State in Article II, Section A hereof, the State hereby agrees to include in its construction contract provisions which require the Contractor to keep and perform the following covenants, conditions and stipulations:

a. Notice. The State will require all contractors to provide to the Railroad the notifications that are required in **Exhibit C and C-1**.

b. Contractor's Methods and Procedures. Unless methods and procedures are otherwise provided for in the construction plans and specifications approved by the Railroad and the State, the Contractor and the Railroad shall agree, in advance of the Contractor performing the Project Work, upon methods and procedures covering all construction across or adjacent to the Railroad property and, when required by the Railroad, the Contractor shall submit such proposals in writing. The Contractor shall at all times keep

covered all pits or openings near or under tracks, except during the time required for actual operations in making such pits or openings and performing work therein. Provisions of this paragraph shall not be construed as relieving the Contractor of or subjecting the Railroad or the State to any responsibility or liability for the Contractor's operations, methods and procedures. The Contractor shall not pile or store any material nor park any equipment closer than twenty-five (25) feet of any track centerline unless authorized by the Railroad's designated representative.

For construction clearance less than listed above, local operating unit review and approval is required.

c. No Interference with Railroad's Operations. The Contractor will cooperate with the officers and the authorized representatives of the Railroad and its tenants to the end that the Contractor's work will be begun, conducted, and completed in such manner as to cause no interference whatsoever with the safety or the continuous and uninterrupted use and operation of the tracks, wire lines and other facilities belonging to the Railroad or its tenants.

d. Contract and License. The State will require its Contractor performing Project Work under the State's Project on the Railroad properties pursuant to this Contract that its Contractor sign **Exhibit C-1** and comply with the covenants, conditions, and stipulations set forth therein and in **Exhibit C**.

3. Contractor's Insurance. The State shall require its Contractor to furnish to the State the certificate, policies and endorsements of insurance as described in **Exhibit C-1**, and the State shall deliver the same directly to the Railroad. All certificates and policies of insurance required hereunder shall comply with the requirements of 23 CFR, Part 646, Subpart A and as set forth in **Exhibit C-1**. The Contractor shall not be allowed to enter upon or perform any Project Work on the Railroad's property unless or until the aforesaid **Exhibit C-1** has been executed by the Contractor and the insurance shall have been accepted in writing by the Railroad. All such insurance shall be kept in full force and effect during all times the Contractor is performing any such work on or adjacent to the Railroad's property.

4. Clearances. The State included provision in its construction contract which requires its Contractor to abide by all clearance requirements as described in **Exhibit C** and in the plans and specifications approved by the Railroad.

5. Temporary Crossings. If a temporary crossing of the BNSF tracks is necessary the Design Build Contractor shall be required to submit design plans for the temporary crossing to the Railroad's Assistant Vice President Engineering – Design or his authorized representative. The Railroad will then review such design plans and advise the Contractor if the design plans for the temporary crossing are acceptable and shall also provide to the Contractor a Railroad cost estimate for the Railroad's installation and removal of the temporary crossing. The Contractor shall first execute the Railroad's Form 432, attached as **Exhibit I**, providing for the Contractor to be responsible for all costs and expenses in the Railroad's installation and removal of the

Contractor's road crossing and any restoration costs involving the Railroad's ballast or other track structure material.

6. Delay to Trains. The State will require its Contractor to furnish, maintain and install, during performance of the Project Work, all advance warning signs or barricade protection that are expressly required by the Railroad for the duration of the Project Work.

7. Construction window periods. The Railroad has identified the following construction window periods where all Railroad track usage by the Railroad may be temporarily stopped for Project Work by the Design Build Contractor: The BNSF may allow a regular 4 hour window template each day beginning at 5:00 AM. The BNSF has indicated that no windows will be allowed to extend further than six (6) hours in duration.

The Railroad has identified that no Project Work will be allowed in the Railroad's Fourth Quarter (October 1<sup>st</sup> thru December 31<sup>st</sup>) that will require Railroad flagging, or otherwise impact full and unobstructed use of any and all railroad tracks by the Railroad.

The Design Build Contractor may negotiate construction window periods other than those identified above with the Railroad at and upon their own risk and cost. The Railroad, at its sole discretion may approve such requests and if approved will provide written approval of all variances in construction window periods to the Design Build Contractor and the State.

8. Protection of Fiber Optic Cable System. The State agrees to include the following provisions in its contract with any contractor performing any Project Work on the Railroad's property:

"Fiber optic cable systems may be buried on the BNSF's property. Protection of the fiber optic cable systems is of extreme importance since any break could disrupt service to users resulting in business interruption and loss of revenue and profits. The Contractor shall telephone BNSF during normal business hours (7:00 a.m. to 9:00 p.m. Central Time, Monday through Friday, except holidays) at 1-800-336-9193 (also a 24-hour number for emergency calls) to determine if fiber optic cable is buried anywhere on BNSF's premises within the limits of the project. If it is, the Contractor shall telephone the telecommunications companies involved, arrange for a cable locator and make arrangements for relocation or other protection of the fiber optic cable prior to beginning any work on BNSF's premises."

9. Subcontractors. The State will require its Contractor to be and remain primarily liable and responsible to the Railroad for all acts or omissions of any subcontractor as described in **Exhibit C and C-1.**

## SECTION C. STATE OBLIGATIONS

1. Obligation to Railroad's Tenants. The Railroad shall have no obligation with respect to removing, relocating, or reinstalling the facilities of its lessees or licensees, required to be

removed, relocated or reinstalled incidental to the State's construction. The State, at its expense, shall make all arrangements with the lessees and/or licensees, which arrangements shall be subject to the approval of the Railroad.

The State shall ensure that prior to any work within the Railroad's right of way, a fully executed **Exhibit C-1** must be in place and the Railroad Flagging must be requested per terms of **Exhibit C and C-1**.

2. Coordination of Work. The State's Acting Regional Transportation Director, Region 6, Randall Furst, 2000 S. Holly St., Denver CO. 80222, is designated to coordinate the Project Work provided for herein; telephone 303-757-9459 and fax 303-757-9073. The State's Project Director is Kevin Sullivan, 2000 S. Holly St., Denver CO. 80222; telephone 303-972-9112 and fax 303-972-9114.

3. Maintenance. Upon completion of construction of the Project Work, the State will maintain, repair, renew, and reconstruct, at the State's expense, the entire New Structure in accordance with the State's standard maintenance procedures. These maintenance requirements do not impose upon the State any responsibility for care or maintenance of pre-existing drainage not affected by the Project Work herein described, nor for care or maintenance of the Railroad's roadbed, communication and signal lines, tracks and appurtenances.

#### SECTION D. PUC APPLICATION AND APPROVAL

The State has made application to the PUC for its approval of the Project and for approval of the continuing maintenance provisions agreed to by the parties. The parties shall cooperate in presenting all matters involved to the PUC in connection with the application. The provisions of this Contract pertaining to the performance of the Railroad Work shall not become effective until approval thereof has been obtained from the PUC.

### ARTICLE IV ADDITIONAL PROVISIONS

#### SECTION A. NO PARTICIPATION BY RAILROAD IN ANY PROJECT COSTS

Pursuant to the provisions of 23 CFR §646.210, the State confirms that this Project is of no ascertainable net benefit to the Railroad and that the Railroad shall not be required to share in any Project costs or costs involving the demolition of the Existing Structure or the construction of the New Structure.

#### SECTION B. FINANCIAL PROVISIONS

1. Contract Amount. The State's Design Build Contractor will budget, appropriate and make funds available to pay the Railroad for additional work under this Project as long as the additional work is legitimate and the Railroad has communicated with the State and the State's

Design Build Contractor to allocate more funds. The Railroad must communicate with the State and the State's Design Build Contractor before the work is performed if practicable. Additional work is work that falls under the definition of "Railroad Work" (but excluding flagging and Engineering review of Plans which are to be billed directly to the State's Design Build Contractor) contained in Article II, Section D, and includes increases in costs of "Railroad Work" due to labor and materials. It is specifically agreed that Railroad labor costs can include as additives, prorated equipment costs as specified in 23 CFR §140.910. The State shall not be responsible for any unauthorized extra work. Extra work is work that does not fall under the definition of "Railroad Work" contained in Article I, Section A.

#### SECTION C. CANCELLATION

In the event delays or difficulties arise in securing necessary approvals, or in acquiring necessary right of way, or in settling damages or damage claims, or for any other reason within twelve (12) months of agreement execution by either party, which, in the opinion of the State render it impracticable to utilize funds from the current appropriation for the construction of the Project, then at any time before actual construction is started pursuant to proper approval or authority, the State may serve formal notice of cancellation upon the Railroad and this Contract shall thereupon become null and void. In the event of any such cancellation the State shall reimburse the Railroad for all related preliminary engineering costs or other costs incurred by the Railroad prior to the effective date of termination.

The Railroad, if it so elects, may recalculate and update any Railroad estimate submitted to the State based on anticipated actual costs that will be incurred by the Railroad in the event the State does not commence construction on the portion of the Project located on the Railroad's property within six (6) months from the date of any such estimate.

The Railroad, if it so elects, may terminate this Contract effective upon delivery of written notice to the State in the event the State does not commence construction on the portion of the Project located on the Railroad's property within twelve (12) months from the scheduled start up of Project Work that will involve work on the Railroad's property.

#### SECTION D. TERM

This Contract shall become effective as of the date first herein written and shall continue in full force and effect for as long as the New Structure remains on the Railroads' property and remains in effect.

#### SECTION E. SUCCESSORS AND ASSIGNS

All of the covenants and provisions hereof shall insure to the benefit of and be binding upon the parties hereto, their successors and assigns.

#### SECTION F. MODIFICATION OF EXISTING AGREEMENT

The Existing Agreement shall remain in effect upon completion of the Project, subject to the provisions of this agreement applicable to the New Structure. This agreement shall supersede and replace the similar provisions of the Existing Agreement applicable to the Existing Structure.

#### SECTION G. SIGNATURE AUTHORITY

The Railroad and the State each represent and warrant that they have taken all actions that are necessary or that are required by their procedures, bylaws, or applicable law, to legally authorize the undersigned signatories to execute this Contract on behalf of the Railroad and the State.

#### SECTION H. EXCEPTIONS TO SPECIAL PROVISIONS

The State and the Railroad agree that Section I, Special Provisions, is hereby amended in the following particulars:

1. The parties hereto agree that the final sentence of paragraph 4, Independent Contractor. (4 CCR 801-2), of Section I, Special Provisions, is replaced with the following:

"Contractor shall provide and keep in force such types of Workers' Compensation Insurance, in the amounts required by law (and provide proof of such insurance, if such insurance is required by law, when requested by the State) and Unemployment Compensation Insurance, if required by law, in the amounts required by law, and shall be solely responsible for the acts of the Contractor, its employees, and agents."

2. The parties hereto agree that the first sentence of paragraph 6, Choice Of Law, of Section I, Special Provisions, is replaced with the following:

"The laws of the State of Colorado and rules and regulations issued pursuant thereto, to the extent not preempted by federal law, shall be applied in the interpretation, execution, and enforcement of this Contract."

3. The parties hereto agree that paragraph 10, Vendor Offset. (§§CRS 24-30-202 (1) & 24-30-202.4) shall apply to this Contract, to the extent not preempted by federal law.

#### SECTION I. SPECIAL PROVISIONS Revised 01/01/09

1. Controller's Approval. (CRS §24-30-202(1)).

This contract shall not be valid until it has been approved by the Colorado State Controller or designee.

2. Fund Availability. (CRS §24-30-202(5.5)).

Financial obligations of the State payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.

### 3. Governmental Immunity.

No term or condition of this contract shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections, or other provisions, of the Colorado Governmental Immunity Act, CRS §24-10-101 et seq., or the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2671 et seq., as applicable now or hereafter amended.

### 4. Independent Contractor.

Contractor shall perform its duties hereunder as an independent contractor and not as an employee. Neither Contractor nor any agent or employee of Contractor shall be deemed to be an agent or employee of the State. Contractor and its employees and agents are not entitled to unemployment insurance or workers compensation benefits through the State and the State shall not pay for or otherwise provide such coverage for Contractor or any of its agents or employees. Unemployment insurance benefits will be available to Contractor and its employees and agents only if such coverage is made available by Contractor or a third party. Contractor shall pay when due all applicable employment taxes and income taxes and local head taxes incurred pursuant to this contract. Contractor shall not have authorization, express or implied, to bind the State to any agreement, liability or understanding, except as expressly set forth herein. Contractor shall (a) provide and keep in force workers' compensation and unemployment compensation insurance in the amounts required by law, (b) provide proof thereof when requested by the State, and (c) be solely responsible for its acts and those of its employees and agents.

### 5. Compliance with Law.

Contractor shall strictly comply with all applicable federal and State laws, rules, and regulations in effect or hereafter established, including, without limitation, laws applicable to discrimination and unfair employment practices.

### 6. Choice of Law.

Colorado law, and rules and regulations issued pursuant thereto, shall be applied in the interpretation, execution, and enforcement of this contract. Any provision included or incorporated herein by reference which conflicts with said laws, rules, and regulations shall be null and void. Any provision incorporated herein by reference which purports to negate this or any other Special Provision in whole or in part shall not be valid or enforceable or available in any action at law, whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision shall not invalidate the remainder of this contract, to the extent capable of execution.

### 7. Binding Arbitration Prohibited.

The State of Colorado does not agree to binding arbitration by any extra-judicial body or person. Any provision to the contrary in this contract or incorporated herein by reference shall be



null and void.

8. Software Piracy Prohibition. (Governor's Executive Order D 002 00).

State or other public funds payable under this contract shall not be used for the acquisition, operation, or maintenance of computer software in violation of federal copyright laws or applicable licensing restrictions. Contractor hereby certifies and warrants that, during the term of this contract and any extensions, Contractor has and shall maintain in place appropriate systems and controls to prevent such improper use of public funds. If the State determines that Contractor is in violation of this provision, the State may exercise any remedy available at law or in equity or under this contract, including, without limitation, immediate termination of this contract and any remedy consistent with federal copyright laws or applicable licensing restrictions.

9. Employee Financial Interest/Conflict Of Interest. (CRS §§24-18-201 and 24-50-507).

The signatories aver that to their knowledge, no employee of the State has any personal or beneficial interest whatsoever in the service or property described in this contract. Contractor has no interest and shall not acquire any interest, direct or indirect, that would conflict in any manner or degree with the performance of Contractor's services and Contractor shall not employ any person having such known interests.

10. Vendor Offset. (CRS §§24-30-202 (1) and 24-30-202.4).

Subject to CRS §24-30-202.4 (3.5), the State Controller may withhold payment under the State's vendor offset intercept system for debts owed to State agencies for: **(a)** unpaid child support debts or child support arrearages; **(b)** unpaid balances of tax, accrued interest, or other charges specified in CRS §39-21-101, et seq.; **(c)** unpaid loans due to the Student Loan Division of the Department of Higher Education; **(d)** amounts required to be paid to the Unemployment Compensation Fund; and **(e)** other unpaid debts owing to the State as a result of final agency determination or judicial action.

11. Public Contracts For Services. (CRS §8-17.5-101).

Contractor certifies, warrants, and agrees that it does not knowingly employ or contract with an illegal alien who will perform work under this contract and will confirm the employment eligibility of all employees who are newly hired for employment in the United States to perform work under this contract, through participation in the E-Verify Program or the Department program established pursuant to CRS §8-17.5-102(5)(c), Contractor shall not knowingly employ or contract with an illegal alien to perform work under this contract or enter into a contract with a subcontractor that fails to certify to Contractor that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this contract. Contractor **(a)** shall not use E-Verify Program or Department program procedures to undertake pre-employment screening of job applicants while this contract is being performed, **(b)** shall notify the subcontractor and the contracting State agency within three days if Contractor has actual knowledge that a subcontractor is employing or contracting with an illegal alien for work under this contract, **(c)**

shall terminate the subcontract if a subcontractor does not stop employing or contracting with the illegal alien within three days of receiving the notice, and **(d)** shall comply with reasonable requests made in the course of an investigation, undertaken pursuant to CRS §8-17.5-102(5), by the Colorado Department of Labor and Employment. If Contractor participates in the Department program, Contractor shall deliver to the contracting State agency, Institution of Higher Education or political subdivision a written, notarized affirmation, affirming that Contractor has examined the legal work status of such employee, and shall comply with all of the other requirements of the Department program. If Contractor fails to comply with any requirement of this provision or CRS §8-17.5-101 et seq., the contracting State agency, institution of higher education or political subdivision may terminate this contract for breach and, if so terminated, Contractor shall be liable for damages.

12. Public Contracts With Natural Persons. (CRS §24-76.5-101).

Contractor, if a natural person eighteen (18) years of age or older, hereby swears and affirms under penalty of perjury that he or she **(a)** is a citizen or otherwise lawfully present in the United States pursuant to federal law, **(b)** shall comply with the provisions of CRS §24-76.5-101 et seq., and **(c)** has produced one form of identification required by CRS §24-76.5-103 prior to the effective date of this contract.

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THE PARTIES HERETO HAVE EXECUTED THIS CONTRACT

**STATE OF COLORADO**

JOHN W. HICKENLOOPER, GOVERNOR

By \_\_\_\_\_  
Timothy Harris, P.E.  
Chief Engineer

**BNSF RAILROAD COMPANY**

By \_\_\_\_\_

ATTEST: \_\_\_\_\_  
(Seal)

**APPROVED:**

**JOHN W. SUTHERS**, Attorney General

By \_\_\_\_\_  
Kathryn Young, Asst. Attorney General

CRS 24-30-202 requires that the State Controller approve all state contracts. This Contract is not valid until the State Controller, or such assistant as he may delegate, has signed it. Except for preliminary engineering review performed by the Railroad or a Railroad contractor as set forth in this Contract, the Railroad is not authorized to begin performance until the Contract is signed and dated below. Except for preliminary engineering review performed by the Railroad or a Railroad contractor as set forth in this Contract, if performance begins prior to the date below, the State may not be obligated to pay for goods and/or services provided.

**State Controller**  
David J. McDermott, CPA

By \_\_\_\_\_  
CDOT Controller

\_\_\_\_\_  
Date